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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-867

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioners

versus

FEDERAL POWER COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL AND REPLY BRIEF OF LOUISIANA POWER AND LIGHT COMPANY

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The Government in the Brief of the Federal Power Commission in Opposition to LP&L's application herein predicates its argument upon the erroneous and misleading assertion: "No petitioner directly attacks the evidentiary findings upon which the Commission rested its jurisdictional determination." (FPC Br. pp. 9-10) The simple truth is that Louisiana Power & Light Company has made such a direct attack consistently since such findings issued, most recently in its petition:

"The principal basis for the FPC's conclusion that interstate gas was being infused into the Green System East derives from the circumstances existent at Points I and J of United's flow diagram, Appendix C herein at A-98. The record before the FPC showed clearly that the same situation exists at both Points: The gas comes from the field to a gas processing plant (Getty Oil at Point I, Humble at Point J) and after being processed, i.e., removing hydrocarbons such as propane or butane, United takes delivery of the gas from the plant and places the gas into one of two lines—one that goes to the Black (interstate) System, the other that goes to Green System East (See the diagram, Exhibit 29, reproduced in Appendix "C" hereto at A-98). There is no basis in this record for a conclusion of commingling.

"As for Points L and M, any reliance by FPC on those situations runs afoul of its own witnesses (Tr. 323-324, 556) who testified that Green gas could not get into the Black System because the Green System operated at a lower pressure than the Black System and there were no compressors on the Green System with which to lift the pressure so that it could enter the Black System. Additionally, such a conclusion by the FPC would render the whole proceeding before it an absurdity because the basic premise upon which United was supposedly required to infuse Black Gas into the Green System was the shortage of gas for the Green System. How then could the Green System be an exporter to the Black System as suggested by the FPC and seriously discussed by the Court of Appeals?" (LP&L 8, f.n. 2)

In its petition LP&L carefully pointed out:

"[T]hat the Court of Appeals is clearly on the inescapable horns of a dilemma: Either the Green System is intrastate by reason of no Black gas being infused into it or, if Black gas is infused,

then Section 1(c) is applicable. Let us explain by reference to the record facts. In Appendix C at p. A-98 we have reproduced in detail the delivery situation at Point I, which detail is also applicable to Point J, these being the only relevant points of connection. Now, the record shows that the gas goes through the gas processing plants (which are owned by Getty Oil Company at Point I and Humble at Point J) which extract hydrocarbons (propane, butane, etc.) from the gas, and the gas is then delivered to United. If it be concluded that the delivery point is immediately upon leaving the Getty Plant (marked by us 'Point of Entry'), then the gas is being delivered to United--a 'person'—by Getty—'another person'--and the 'person-to-person' requirement is obviously satisfied. On the other hand, if it be concluded that the delivery from Getty to United takes place after the gas passes through the 93' of separators, regulators, and meters (at the place we have marked 'Point of Separation'), then there is no infusion of Black gas into the Green System. Under the requirement established by the Court of Appeal, either the Green System East is intrastate or it is entitled to a Hinshaw Amendment." (LP&L 12-13)

Of course, this argument by Louisiana Power & Light Company was subsumed under its discussion of pure questions of law, which it deemed to be the proper matter for a Petition for a Writ of Certiorari.* The Government's raising of this issue of fact constitutes a confession that the Court to dispose of this case must consider it on the merits and, therefore, the Writ of Certiorari should be granted.

For the convenience of the Court in following the arguments raised with respect to Points I and J, Louisiana Power & Light Company is including as Appendix A hereto

* Significantly, the Government did not cite and cannot cite any portion of the appellate court's opinion to sustain its claim (FPC Br. 11) that the substantial evidence test was applied as required by law.

the flow diagram which it previously attached as page A-98 of the Appendix to its Petition (Appendix C). With respect to Points L and M, discussed by Louisiana Power & Light Company in its Petition, LP&L would like to supplement its Petition by noting the subsequent observation of the Presiding Administrative Law Judge of the Federal Power Commission in the related case of United Gas Pipe Line Company and Texas Eastern Transmission Corporation, Docket No. CP67-26, decided January 15, 1974. There the Administrative Law Judge noted: "Similarly United indicates that the proposed condition declaring that approval of the exchange will not be deemed to authorize any gas in United's Green System-East to be sold or transported outside Louisiana would be useless because United has no intention of doing so; and that, furthermore, *the record in Docket No. CP71-89 makes clear that it would be impossible for this to happen (because of existing pressure differentials) without additional construction subject to the Commission's jurisdiction.*" (Emphasis added.) This observation confirms LP&L's position and belies the conclusion by the Federal Power Commission (Opinion No. 610 at LP&L A-48;* Opinion No. 610-A at LP&L A-78) and the argument advanced by United Gas Pipe Line Company to the Fifth Circuit (United Br. pp. 21-22, Appendix B hereto) that the gas of the Green System-East ever became commingled with gas in interstate commerce. This point is quite important because Louisiana Power & Light Company in its Petition *relied upon this Court's decisions* in *California v. Lo-Vaca Gathering Company*, 379 U.S. 366 and *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687 (and did not, as the Government states, argue that these cases are "distinguishable") which require such commingling before an intrastate system can be converted into an interstate one.

* Noted by the Government at p. 5, f.n. 3 of its Brief herein.

CONCLUSION

The Government's contention that "[n]o party contends that the gas introduced into the Green System East is not diverted from precisely such an interstate channel" is both false and immaterial. It is false because Louisiana Power & Light Company did point out and has established that the gas introduced at Points I and J, the only gas arguably substantial, is not diverted from any interstate channel of gas. However, this falsity is immaterial because the test under *La Vaca* and *Amerada* is whether such gas is intermingled in a channel of constant flow, which is not the case here because of the situation extant at Points L and M. Therefore, Louisiana Power & Light Company urges the Court to grant certiorari and reverse the patently erroneous decision of the Fifth Circuit in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April 1974 three copies of the foregoing were mailed, postage prepaid to all counsel of record for the parties in Docket Nos. 73-867, 73-868, 73-550, 73-868, 73-871, 73-872 and 73-874.

s/ Andrew P. Carter

APPENDIX A

EXHIBIT 29

United file a Section 7(c) certificate application.[39] The filing of the application triggers the FPC inquiry into price and other factors made mandatory by *CATCO* and *Transco* and the FPC concern that the ultimate resale consumer not be saddled with direct-sale costs that should be covered by direct-sale revenues. Admittedly, the finding of jurisdiction is helpful to United; however, the real beneficiary is the ultimate consumer.

The substantial dependency of Green-East on interstate gas and the ability of the Green-East facilities to deliver substantial peak day volumes of interstate gas is, by itself, substantial evidence supporting the FPC's determination that the New Orleans District facilities, including the Green-East facilities, are integrated into United's interstate operation. In addition, the Court should understand that these pipes are not colored. Although the maps are colored for convenient reference, the gas moves in the New Orleans District facilities (both Green-East and West) freely. The only place that Green *System*-East exists is in the minds of the petitioners. Shell's description (Shell Br. 13), for example, of the 8.3 million Mcf flow from Green East into Green-West, where it was commingled with interstate gas from the Napoleonville-Kosciusco line and in turn delivered to Mid-Louisiana Gas for consumption in the Baton Rouge area within the Lafayette District, demonstrates that fact.

Whether or not any of the Green-East gas ever gets out of the state of Louisiana is beside the point.[40] Such a

[39] Those who describe the interstate flows as unauthorized implys that, despite the confusing factual picture presented to United and the FPC Staff after *Florida Parishes* (Text, *supra* at 3-4), United should have filed its application earlier. This is an extraordinary position in view of the arguments of several, including some of the same petitioners, that no certificate is needed because the facilities are nonjurisdictional.

[40] *See infra* at 22.

flow demonstrates the substantial integration of United's main Louisiana pipelines and the other Louisiana facilities with its remaining interstate operations. This is all United understood the FPC to mean when it said (R. 3443, ¶ 39):

> Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities.

Had it intended to base its jurisdictional finding on being able to trace some gas out of Green-East across a state line it would have said so.

Again, Commissioner Carver's characterization of the majority opinion (R. 3684) is inaccurate, and the petitioner's argument (Shell Br. 14; NOPSI Br. 7) based on Commissioner Carver's view is unfounded.

This same flow from Green-East to Green-West and over into Mid-Louisiana's facilities near Baton Rouge also disposes of the eleborate arguments based on pressure and lack of compression which are designed to suggest that once gas gets into Green-East it never gets back out.[1]

This leaves only the argument that the gas is produced, transported and consumed wholly in Louisiana. That was true in *Lo-Vaca* and *Florida Parishes*. For example, the FPC opinion in *Florida Parishes* states:

> No contention is made, and there is admittedly no possibility that the gas which is the subject *of that sale* by United, *or any part thereof*, will thereafter be transported in interstate commerce outside the state of Louisiana. 30 FPC 560, 584.

That fact did not alter the jurisdictional result there: it does not alter it here.

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[1] Emphasis added.